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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 121

ALBERT BRACER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ALBERT BRACER,

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Albert Bracer, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on March 9, 1965.

Opinion Below

The opinion of the Court of Appeals, printed in the appendix hereto, *infra,* is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on March 9, 1965 (Appendix hereto, *infra*). Mr. Justice Harlan, by order, has extended the time for filing a petition for a writ of certiorari in this case to and including May 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Petitioner was convicted of narcotics violations in a trial in which the Government introduced alleged written confessions taken from him while he was admittedly suffering from "withdrawal symptoms" as a narcotics addict. The Government also introduced narcotics seized from petitioner's home without any warrant, but on the claim that there was a "consent" which petitioner claims was given by him without understanding that he had any right to withhold the consent. Also, the "confessions" were extracted from petitioner in the absence of his counsel and without adequately warning him of his constitutional rights. And the "confessions" were admitted in evidence by the Trial Court without conducting a separate hearing out of the presence of the Jury on the issue of voluntariness. Finally, all of this evolved after an arrest of the petitioner without a warrant and, petitioner claims, without probable cause. The questions are:

1. Were the alleged confessions inadmissible because extracted from petitioner while he was suffering from narcotics withdrawal symptoms which mentally disabled him?

2. Was the nighttime search of petitioner's home, concededly not incident to any lawful arrest, justified by an alleged consent which petitioner uncontradictedly claims was given by him upon a misunderstanding (or rather upon *no* understanding) of his constitutional rights, and without being warned of such rights?

3. Was the extraction of the alleged confessions in the absence of any attorney for petitioner violative of his Sixth Amendment right to counsel?

4. Was petitioner denied his constitutional rights under the *McNabb* doctrine by being detained for an entire night and into the next morning and by being questioned during that time notwithstanding his manifest illness caused by deprivation of addictively required narcotics?

5. Was petitioner's warrantless arrest made upon probable cause, or upon "reasonable grounds" under 26 U.S.C. §7607?

6. Was petitioner denied his constitutional right to a separate hearing at his trial, out of the presence of the Jury, on the issue of the voluntariness of his alleged confessions?

7. In combination, and in their overall impact, do the circumstances of petitioner's arrest, subjection to search and seizure, prolonged detention and subjection to official interrogation while ill and in the absence of counsel, and denial of the right to a non-jury initial judicial determination of the voluntariness of his confession, vitiate the constitutionality of petitioner's conviction?

Constitutional Provisions, Statutes and Rule Involved

The case involves 21 U.S.C. §§173, 174 (narcotics violation); 26 U.S.C. §7607 (arrests etc. by narcotics agents etc.); and Rule 41(e) Fed. Rules Crim. Proc. (suppression of evidence). These provisions are printed in the Appendix hereto *infra*. The case also involves the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment

(due process of law) and the Sixth Amendment (right to counsel) of the United States Constitution.

Statement of the Case*

Petitioner Albert Bracer was convicted, after a jury trial in the United States District Court for the Southern District of New York (McLean, D.J.), on two substantive counts and one conspiracy count of narcotics violations under 21 U.S.C. §§173, 174 (8a, 39a). He was sentenced to seven years on each count, to run concurrently (39a). The United States Court of Appeals for the Second Circuit affirmed the conviction (Appendix hereto, *infra*).

The indictment, filed May 20, 1963, contained eight counts, of which petitioner was named in Counts Five, Six, Seven and Eight (the last count being for conspiracy) (8a). Two other defendants, Diego Torres and Richard Solero, were named in the indictment; they were convicted together with petitioner, but they evidently did not appeal their convictions. Count Five of the indictment was dismissed as to petitioner at the trial (3a). Counts Six and Seven, on which

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* " a" refers to the printed "Appellant's Appendix" in the Court below, nine extra copies of which are filed herewith. "G a" refers to the printed "Appendix for United States of America" in the Court below, of which nine extra copies are also filed herewith. Citations to non-printed portions of the Record on Appeal in the Court below—all such citations herein being to the typewritten stenographic minutes of the trial—appear herein as "Tr. ". The copy of those stenographic minutes which was docketed in the Court below is filed herewith. In addition, there is contained in the certified record filed herewith a stenographic transcript of a pretrial proceeding dated February 5, 1964 upon a motion by the within petitioner to suppress evidence, hereinafter cited as "Tr. Mot. Suppr. ".

petitioner was convicted, charged him alone with two similar substantive offenses both committed on April 10, 1963 in which the amounts of heroin involved were four grams and 340 grams, respectively (11a-12a); Count Six (the four grams) was based on a seizure of the heroin in Bracer's automobile incident to a warrantless arrest and search; Count Seven (the 340 grams) was based on heroin seized in Bracer's home later that same night in another warrantless search, there being dispute as to whether Bracer voluntarily consented.

Petitioner is admittedly a narcotics addict. Throughout this case it has been his contention, which we believe would not be seriously disputed by the Government, that his narcotics activity has not been of a direct monetary character, i.e., that aside from his possession of narcotics for his own personal use, his possession of narcotics belonging to other persons has been done by him as a service to such persons for which he was rewarded by being given narcotics for his own addictive requirements.

The narcotics investigation which led to the within indictment commenced around the end of March 1963 with dealings between the Bureau agents and the co-defendants Torres and Solero (G9a-14a, 25a). On April 1, 1963 the agents observed Solero go to an apartment building in the Bronx and enter an apartment which later was learned by the agents to be Bracer's, although it was not seen who if anyone admitted Solero to the apartment or who else was there (G27a; Tr. 382, 561-563). Shortly after this Solero returned to a rendezvous with a narcotics agent and delivered to him an ounce of heroin which he had promised in order to make up the full quantity of another delivery of

earlier that day (G18a, 24a, 27a). (In the trial herein, it was the Government's contention that Solero got this ounce of heroin from Bracer, but the Trial Court dismissed as to Bracer the count of the indictment relating to this transaction (Count 5), and it is evident that no case against Bracer had been proved as to that transaction.)

The next day, April 2, 1963, the agents found in the files of the Narcotics Bureau a reference to the apartment building and the apartment number where Solero had been seen to enter, and it appeared that Albert Bracer, who had a previous narcotics arrest, resided there; the agents also at that time looked at a photo of Bracer (G57a).

Later that same day (April 2, 1963) Agent Bailey ordered some more heroin from Solero (G20a). The next day Solero told Agent Bailey that everything was set and that he was going to meet his connection (G22a, 44a). Solero was then observed going to a location in the Bronx where he remained for a short while on the street when an automobile drove by and one of the agents recognized the driver of the car from the picture of Bracer seen in the office of the Narcotics Bureau the day before. Bracer and Solero were observed briefly moving about separately in that locality, Solero on foot and Bracer in his car, in what the Government claimed had the appearance of some sort of cautious effort to join each other (G29a-30a, 59a-62a). Solero then went back to join Agent Bailey whom he told that he had seen his connection but that the latter did not stop (G22a, 29a-30a, 60a-61a).

On April 8 the Agents arrested Solero, who then informed them that he had been obtaining heroin from Bracer (G63a).

The foregoing describes *all* of the information that the Government had "against" Bracer at the juncture last mentioned (the April 8 arrest of Solero). It is therefore of concern to note that the narcotics agents evidently at this juncture concluded, on the basis of this information, that they had sufficient probable cause to arrest Bracer without a warrant under the provisions of the narcotics legislation permitting warrantless arrests upon "reasonable" grounds to believe that the person to be arrested has committed or is committing such violation" (26 U.S.C. §7607).

The agents then waited two days—for reasons nowhere in the record explained—before arresting Bracer, which they did on April 10, 1964 when they intercepted him in his automobile at 10 P.M. at night on a city street, the arrest being carried out in a somewhat "gangbuster" kind of technique, involving a cutting off of Bracer's automobile by the agents' vehicle pulling in front of it, etc. (G23a, 49a, 53a; Tr. 280, 510-511). Bracer was accompanied in his automobile at the time by a nephew, a young boy (Tr. 280, 512-513). On searching Bracer's car, the agents found four grams of heroin—which is concededly a user's rather than a "seller's" quantity (Tr. 280-281, 282).

At this point in the history, there had come about as a result of the agents' conduct a by-no-means easy to justify warrantless arrest and a search incident thereto. And the legal situation was now shortly to become even more complicated as the agents pressed their physical advantage over Bracer whom they now were holding in his automobile under arrest.

From this point on in the chronology it becomes especially necessary to scrutinize with a critical mind the agents'

version of what occurred, inasmuch as we shall now be finding the agents not merely describing their own movements and observations, but their dealings with, their conversations with and their treatment of Bracer—obviously a subject matter that calls for critical evaluation in the light of the familiar due process and search-and-seizure controversies which so often tend to arise in cases of this sort. And we readily acknowledge that this task of critical evaluation is not made easier in cases where, like ours, the defendant has not taken the stand to testify in his trial or in his proceedings upon motion to suppress evidence, so that it becomes the task of the evaluational critic to discern the ultimate probable truth primarily from close examination of the version of the alleged events offered by the Government's police witnesses.

The materials in this record which are available for such an examination are the testimony of the agents in a pretrial proceeding upon a motion to suppress evidence, testimony of the agents at the trial which was taken on the question of admissibility of alleged confessions made by Bracer, and the texts of those alleged confessions.

We had reached the point above in the chronology where the agents had Bracer under arrest in his car and had seized in the car four grams of heroin. The agents now of course began questioning Bracer, particularly about additional heroin which the agents told him they knew he must have in his home (Tr. 64-65, 307-308).* Bracer expressed concern about being seen by people who knew him in the neighborhood where the agents were holding him, and

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* Solero when himself arrested on April 8, 1963 had told the agents that Bracer had a quantity of heroin in his home. (Tr. 277).

about getting his young nephew home; the agents then took him to a more secluded neighborhood (Tr. 64, 512). There then followed an interrogation, in the car, which apparently lasted at least one hour and may have lasted more, in which Bracer at first denied having heroin at his home and later admitted it (Tr. 64-65, 289-291). As the time was stretching on into a rather late hour of the night, and as the agents (according to their version) were saying to Bracer that they could get a search warrant to search Bracer's home and that this would involve going downtown and going through the necessary procedures, Bracer finally proposed, according to the agents, that he would voluntarily let them into his home and that they would not need a search warrant, all in the interests of avoiding commotion and undue disturbance of Bracer's pregnant young wife and elderly mother (Tr. 65, 394-397; Tr. Mot. Suppr. 980-982). They then went to Bracer's home, where the 340 grams of heroin were found and seized (Tr. 65, 70, 586-587). Circumstances denoting that the agents' velvet-glove approach to the question of a search warrant by no means excluded the mailed-fist, came to light in the admission of one of the agents that when they arrived at Bracer's home and the door was answered by the wife who said she had to go back inside to put on a robe, the agents immediately remonstrated with Bracer that if the wife was going back inside to dispose of heroin there would be trouble, and it was admitted also that the agents "may have" said they were going to break down the door to Bracer's apartment if necessary, Bracer assuring them however that his wife was not going back inside to destroy any evidence (Tr. Mot. Suppr. 976-977).

(In a statement taken from Bracer the following morning by an Assistant United States Attorney, and which we

take up in more detail *infra* in its place in this chronological sequence, Bracer said that he did not know at the time he agreed to let the agents come up to his apartment that he did not have to let them come up (G36a).)

After the search and seizure at Bracer's home, the agents put to Bracer a proposal that he should cooperate with them in making contacts for them with big suppliers of heroin, and the agents with Bracer in tow then went (still that same night) to a bar or to more than one bar where Bracer made telephone calls trying to locate the desired "contacts" (Tr. 308-310). During the course of these activities in the bars Bracer began to be ill, displaying what the agents acknowledged were in the nature of the withdrawal symptoms of a narcotics addict who is in need of a dose of narcotics; Bracer showed nausea and sweating, and the agents said he may have vomited in the bathroom at one of the bars (Tr. 294-295, 310, 515-516). Bracer's evident and intensifying physical distress by no means caused the agents to halt their efforts for that night, and instead they took Bracer downtown to the Narcotics Bureau headquarters at 90 Church Street in Manhattan, where they kept on further questioning him. He was put in a small detention cell where there may or may not have been a bed (the agents were not in agreement on this) and where in all likelihood he was kept handcuffed (Tr. 311-312, 330, 529). All this time his illness symptoms were naturally becoming more pronounced (Tr. 311, 323, 328, 524-527). During this middle-of-the-night ordeal at 90 Church Street the agents took from Bracer a typewritten two-page question-and-answer statement in which he admitted the inculpatory facts referred to *supra* (Tr. 312-313—printed in Appendix C, hereto, *infra*). From disparate testimony of the agents it appears that Bracer

may or may not have been given any nourishment during all of that night or during the next morning either (Tr. 339, 342, 530-531).

The next morning the agents took Bracer before an Assistant United States Attorney (Mr. Gold), where another statement was taken from Bracer and stenographically transcribed (Tr. 340-342; G34a). It was in this latter statement that Bracer said, as earlier herein mentioned, that he was not aware of his right to have refused to let the agents into his home (G36a).

Bracer was then released by a Commissioner on his own recognizance, evidently in the expectation of further cooperation (Tr. 344).

The arrest, the two searches, the night long Odyssey, the prolonged custodial detention of a worseningly sick narcotics addict deprived of his drugs, and the extraction from him of two detailed confessions, all were accomplished by the Government officers without benefit of formal process at any stage, i.e., the arrest and the searches and all the rest of the assertion and imposition of authority were warrantless, and there was no arraignment until after all of this.

Nor was Bracer given, at any point—until the Assistant United States Attorney came into the picture on the morning after the long night—any warning that he had a constitutional right to the assistance of counsel. Even the Assistant United States Attorney did not apprise Bracer of his right to counsel in a manner which met constitutional standards, it seems to us, for Mr. Gold merely said to Bracer "You are entitled to have an attorney, do you have

one?", to which Bracer replied "No", and that was the end of that, because Mr. Gold went on immediately to put questions to Bracer and to take down his answers (G34a). The agents and Mr. Gold did, in taking Bracer's written statements, warn him of his right to remain silent.

At the trial of this indictment the Government introduced in evidence against Bracer the heroin seized in his automobile and in his home, the two written confessions,* and testimony of the agents describing their conversations and their dealings with Bracer substantially along the lines hereinbefore described (Tr. 62-66, 280-285, 512-520, 602-605).

The Bracer defense had attempted, by a motion to suppress before trial, to exclude the heroin seized in Bracer's home; the motion was denied; the testimony of the narcotics agents in that motion proceeding was substantially along the lines of our above description with regard to the search and seizure at Bracer's home and the antecedent arrest (Tr. Mot. Suppr. 956-1008). At the trial the Bracer defense again challenged this evidence, it challenged also the confessions and the arrest and seizure in the automobile, and at the close of the trial all of these search and seizure contentions were renewed (Tr. 67, 602, 785-798).

One or two items remain to be mentioned by way of completing our above chronological description of the happenings prior to the trial: Evidently sometime later in April 1963 Solero recanted the confession or admission which he had given to the agents on April 8 and which, as

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* The confession to the agents was Ex. 21 in the trial (printed in the Appendix hereto, *infra;* the confession to the United States Attorney appears at G. 34a).

seen, had contributed to the agents' belief that they had additional justification to arrest Bracer on April 10 without a warrant (Tr. 185-186, 192). Solero took the stand in this trial, adhering to the recantation (Tr. 702-782). It was after this Solero recantation in April 1963 that the Government for the first time moved with formal process in this case, i.e., the defendants were indicted on May 20, 1963 (1a). It seems safe to surmise that the Grand Jury must have been given all or some of the "evidence" which the Government had secured against Bracer by the above described methods of utter "informality"; unfortunately the Bracer defense does not appear to have sought an inspection of the Grand Jury minutes.*

All of Bracer's contentions addressed to the arrest, searches and seizures were rejected in the trial and in the appeal in the court below. Those contentions, however, in several important respects noted *infra,* had not been presented on Bracer's behalf in the way that we are attempting to do in this petition for certiorari; and we hasten to say that we are only too painfully aware of the handicaps under which an application for certiorari must labor when this Court is being asked to take up issues that were not presented or that were differently formulated in the lower courts. We are frankly hoping that the points of constitutional aggrievement in this case may be deemed by this Court sufficiently fundamental to merit redress even at this lofty and late stage of review.

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* As we are shortly to mention, it is also unfortunate that several other points which we respectfully deem to have been available to Bracer at various stages before and during the trial, and in the appeal in the Court below, do not seem to have been raised or preserved on his behalf. This is something that is of concern both to Bracer's present counsel, and to his counsel in the courts below, with whom the matter has been discussed in a candid spirit.

Reasons for Granting the Writ

For the resolution of the questions of the constitutionality of the arrest, the searches, and the extraction of the confessions in this case, we respectfully suggest that the proper method of inquiry is that mentioned in *Rios* v. *United States*, 364 U.S. 253, 255, *viz.*, "a particularized evaluation of the conduct of the officers involved". Cf. the reference in *United States* v. *Rabinowitz*, 339 U.S. 56, 66 to "the total atmosphere of the case". The cumulation of constitutional wrongdoings by the Government's officers to which resort was had to send petitioner Albert Bracer to prison for seven years could supply the table of contents for a catalogue of classic Fourth-Fifth-and-Sixth Amendment violations. *First,* there was no probable cause for Bracer's warrantless arrest—because the agents had nothing except (a) the surveillance of Solero on April 1, 1963 involving the Bracer apartment (an item later found insufficient as a matter of law by the Trial Court to sustain a charge against Bracer based thereon), (b) the word of Solero that he was going to meet his contact on April 2, 1963 and the surveillance of Solero and Bracer *not* joining up with each other on that occasion, (c) the Narcotic Bureau's file reference to Bracer as having had an apparently not-too-notable prior narcotics incident, and (d) the post-arrest accusation against Bracer by Solero on April 8, 1963 *which Solero subsequently recanted**. *Second,* there is no explanation why the agents waited two days before arresting Bracer after their "probable cause" was ostensibly complete, i.e., they had ample time to get an arrest warrant. *Third,* the agents evidently contrived to stage the Bracer arrest under

* What a model example of a "reliable informant"!

conditions that would give them an initial psychological advantage and ostensible legal need for an "emergency" search, i.e., a nighttime arrest of the suspect while driving in a motor vehicle. *Fourth,* the agents pressed their psychological advantage of thus throwing Bracer into demoralization, by maneuvering him into a "consent" to search his home without a warrant and in the nighttime. *Fifth,* the agents then put Bracer through a night of refined torture which yielded two "confessions".

Where shall one begin in an effort to "cite the cases" whose enunciation of Fourth-Fifth-or-Sixth Amendment principles were flouted here? Need one go beyond *Giordanello* v. *United States,* 357 U.S. 480, 485-486 on the issue of probable cause to make the arrest? Or beyond *Jones* v. *United States,* 357 U.S. 493, 498-499 and *Johnson* v. *Zerbst,* 304 U.S. 458 on the issue of the nighttime search of a private dwelling with "consent"? Or beyond *McNabb* v. *United States,* 318 U.S. 332 plus *Escobedo* v. *Illinois,* 378 U.S. 478 on the issue of the prolonged detention with its harvest of "confessions" from a prime suspect who did not have counsel and who, at least in connection with the first confession, was not even warned of his right to counsel? Or beyond *Townsend* v. *Sain,* 372 U.S. 293, on the issue of Bracer's state of physical and mental health at the times in question in view of his narcotics-withdrawal symptoms?

Unfortunately, as earlier mentioned, much of our formulation given in the above paragraph was not presented to the Courts below on Bracer's behalf. The Bracer contentions on these constitutional issues in the Courts below did not go beyond challenging the legality of the warrantless arrest for lack of probable cause, the constitutional effectiveness of the "consent" to the nighttime search of

Bracer's apartment, and a rather indistinct contention that the Bracer confessions may not have been voluntary. The *McNabb* (delayed arraignment) contention and the *Escobedo* contention were not advanced on Bracer's behalf—*Escobedo,* at any rate, had not been decided before the instant trial ended, although the point was available for the appeal in the Court below.

Still another point which was available to Bracer in the lower Courts but was not raised, and which we have not previously mentioned in this petition, is that the examination of the narcotics agents at the trial on the issue of the voluntariness of the alleged confessions was conducted in the presence of the Jury, i.e., without regard for the principle of *United States* v. *Carignan,* 342 U.S. 36 and *Smith* v. *United States,* 348 U.S. 147, 151. It is unfortunately true also, that Bracer's trial counsel did not invoke this principle at the trial. Still, we feel obliged to, and we do urge with all earnest respectfulness, that this point is so fundamental as to merit the Court's attention even at this tardy stage, in view of the predominant policy importance with which the Court endowed the principle in question in *Jackson* v. *Denno,* 378 U.S. 368.

We are quite uncomfortably aware that from the standpoint of appellate procedure and of the understandable policy of jurisdictional frugality which controls this Court's administration of its certiorari discretion, we are "asking a lot" in requesting this Court to consider our above mentioned certiorari contentions in their entirety rather than as limited by that which was raised in the lower courts. It does seem to us, however, that petitioner Albert Bracer has not thus far had the benefit of a well-apprised judicial con-

sideration of the really rather extraordinary governmental investigative procedures without which he could not have been convicted and sentenced in this case. We trust it is not improper to suggest that a grant of certiorari in this case at this stage would be in *everyone's* ultimate interest because it would avoid the necessity of the laborious proceedings under 28 U.S.C. §2255 to which Bracer would alternatively be obliged to resort in order to obtain, at last, judicial consideration of the entirety of the unusual complex of constitutional improprieties which he asserts.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER
Attorney for Petitioner

SAMUEL SEGAL
Of Counsel

(Appendices follow)

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 325—September Term, 1964.

(Argued January 27, 1965 Decided March 9, 1965.)

Docket No. 29364

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALBERT BRACER,

Defendant-Appellant.

Before:

WATERMAN, SMITH and ANDERSON,

Circuit Judges.

Appeal from judgment on conviction after trial to the jury in the United States District Court for the Southern District of New York, Edward C. McLean, *District Judge,* on two counts of violation of 21 U. S. C. §§173-174 and one count of conspiracy so to do. Affirmed.

PHILIP SEGAL, New York, N. Y. (Samuel Segal, New York, N. Y., on the brief), *for defendant-appellant.*

R. HARCOURT DODDS, Asst. U. S. Attorney, Southern District of New York (Robert M. Morgenthau, United States Attorney and

Jack D. Samuels, Asst. U. S. Attorney, So. District of New York, on the brief), *for appellee.*

SMITH, *Circuit Judge*:

After a trial by jury in the United States District Court for the Southern District of New York, McLean, *J.*, the appellant Bracer was found to have violated 21 U. S. C. §§173-174 by receiving, concealing, selling, and facilitating the transportation, etc., of approximately 4 grams and 340 grams of heroin on two separate occasions on April 10, 1963, and to have conspired with co-defendants Torres and Solero to violate §§173-174. He received concurrent 7-year sentences on all counts. Bracer was arrested without a warrant on April 10, 1963 following the arrest on April 8 of Solero, who informed the agents that he had been obtaining his heroin from Bracer. At the time of his arrest, Bracer's car was searched and a package of heroin discovered on the floor, and while being interrogated Bracer volunteered to the arresting agent that he had additional heroin stored in his apartment. Bracer then consented to a search of his apartment. Bracer now contends that the search of his home was without his consent and hence unlawful, that his arrest without a warrant was illegal, in that probable cause was lacking, and that the heroin obtained at the time of his arrest was hence inadmissible evidence, and that there was insufficient evidence to support the conspiracy conviction. He has failed to demonstrate error on either of the substantive counts, and we affirm the judgment on the substantive counts. We do not reach the conspiracy count.

In the first place, the arresting agent Bailey had probable cause to make the arrest and to search Bracer's automobile. The evidence outlined below, obtained through the agents' surveillance showed to a high degree of probability that the appellant was an integral part of the distribution scheme and further served to substantiate Solero's claim that Bracer was the source. When, on April 1, Solero ventured out to obtain an additional ounce of heroin for Bailey who was acting as a purchaser, Solero was seen by the agents to proceed directly to Bracer's apartment and to return immediately to Bailey with the additional heroin. Furthermore, the files of the narcotics bureau showed that Bracer had previously been convicted for a narcotics violation, and information Bailey had received from a fellow agent disclosed that appellant was engaged in the narcotics trade. Finally, on April 3, Solero told Bailey that he was going to meet his connection. Agents watching Solero then saw him proceed to a street corner in the Bronx where, after waiting a short while, he twice motioned to Bracer who drove past him on two different occasions without stopping; and, when Solero returned to Bailey, he told Bailey that he had just seen his connection, but that his connection for some reason did not stop.

26 U. S. C. A. §7607 empowers a narcotics officer to make arrests without a warrant for violations of the narcotics laws when he has "reasonable grounds to believe that the person to be arrested has committed or is committing such violation." "Reasonable grounds" is construed to mean probable cause, and probable cause is defined to mean more than mere suspicion, but not that the arresting officer be in possession of evidence sufficient to result in the con-

viction of the suspect—it requires evidence which would "warrant a man of reasonable caution in the belief" that a felony has been committed. *Wong Sun* v. *United States,* 371 U. S. 471, 479 (1963). Whether there was probable cause for the arrest is held to be a factual determination depending on the particular facts of the case. See *United States* v. *Williams,* 336 F. 2d 183 (2 Cir. 1964); *United States* v. *Wai Lau,* 329 F. 2d 310 (2 Cir. 1964). The facts here plainly presented such reasonable grounds for Bracer's arrest. In *United States* v. *Smith,* 308 F. 2d 657 (2 Cir. 1962), cert. den. 372 U. S. 906 (1963), this court held that probable cause existed for the defendant's arrest where an informer said he had bought from her, she had been observed meeting the informer, the description given agents by the informer proved to be correct and she appeared at the appointed time and place at which a sale of narcotics was to be made to an undercover agent. If the court in *Smith* was able to find sufficient reliable evidence, additional to the word of the narcotics peddler, to establish the requisite probable cause, then clearly there was probable cause for arresting Bracer whose activities were scrutinized at least as closely as Smith's.

Bracer next contends that the search of his home was without his consent and hence unlawful. According to the Government, after the agents arrested Bracer, they informed him that they would have to obtain a search warrant in order to search his apartment. Bracer, it was claimed, then freely consented to such a search and led two agents to his apartment where an additional supply of heroin was uncovered. At trial, appellant moved to suppress the evi-

dence thus obtained on the ground that he had withdrawn his consent upon reaching his apartment door.

The trial court denied the motion to suppress, finding that the search was conducted by the agents with the consent and approval of Bracer. While it is true that the Government has the burden of proving by clear and positive evidence that such consent was given, *Channel* v. *United States,* 285 F. 2d 217 (9 Cir. 1960), the finding whether the consent was voluntarily given is a finding of fact that should not be lightly overturned by the appellate court. Here, there was evidence that after the agents told Bracer that they were going to get a search warrant for his apartment, he volunteered to take them to the apartment if only two agents would go along, so as not to frighten his wife and mother, that Bracer told his wife to let them in and that she did so, whereupon Bracer led the agents to the cabinet containing the heroin. Moreover, the situation presented here bears a striking resemblance to that of *United States* v. *Smith, supra.* In both cases the defendant was arrested while in the possession of narcotics and prior to the obtaining of consent for the subsequent search, and the consent was with knowledge that the agents could and would obtain a warrant, quite unlike the search before the arrest issue posed by *United States* v. *Como,* —— F. 2d ——, 2 Cir., January 26, 1965, slip opinion pp. 957, 960. The denial of the motion to suppress was correct. The judgment of conviction is affirmed.

APPENDIX B

Judgment Sought to be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of March one thousand nine hundred and sixty-five.

Present:

HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DIEGO TORRES,
ALBERT BRACER,

Defendants-Appellants,

RICHARD SOLERO,

Defendant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment Sought to be Reviewed

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

APPENDIX C

Trial Exhibit 21—Alleged Confession to Narcotics Agents

(See also G34a for Alleged Confession to U.S. Attorney)

This statement taken in the presence of Agent James S. Bailey and John F. Kreppein from the defendant Albert Bracer.

Q. Mr. Bracer, I wish to advise you of your constitutional rights in that anything you say might be held against you. Do you understand.

A. Yes.

Q. You were arrested last night being April 10, 1963.

A. Yes.

Q. Would you describe what happened when you were arrested.

A. You said anything I said would be held against me . . . so . . .

Q. I'm only asking what happened when you were arrested. You got into the car about 10:00 P.M. didn't you.

A. Yes.

Q. How much stuff did you have.

A. About a $5.00 bag.

Q. Did you notice the Agents approaching the car.

A. No not right away.

Q. Did you throw the stuff on the floor.

A. Well it was on the floor already before I even saw you.

Q. Did you give us permission to search your house.

A. No.

Appendix C—Trial Exhibit 21—Alleged Confession to Narcotics Agents

Q. Isn't it true that you said there was heroin in your apartment and that there were people there, your wife and mother.

A. That's right.

Q. Did you offer to let us look around your apartment.

A. Well I offered you the heroin but there was still searching going on beside that.

Q. Weren't you asked in the car if you had heroin in the house.

A. Yes.

Q. Didn't you say that you had a couple of bags.

A. Yes.

Q. And then weren't you asked how much was a couple of bags.

A. Yes.

Q. And wasn't your answer a couple of ounces.

A. Yes.

Q. How much heroin was actually in the house.

A. 12 ounces.

Q. Weren't you asked where the heroin was in the house.

A. Yes.

Q. And didn't you reply that it was in the kitchen cabinet and asked us not to mess the apartment while searching.

A. Yes.

Q. And didn't you take us up to your apartment voluntarily.

A. Yes.

Appendix C—Trial Exhibit 21—Alleged Confession to Narcotics Agents

Q. Did you give the heroin to us.

A. Yes.

Q. Did you make this statement voluntarily and of your own free will. Did anyone force you.

A. No.

/s/ ALBERT BRACER
Albert Bracer

Witnessed by:

/s/ JAMES S. BAILEY
James S. Bailey

/s/ JOHN F. KREPPEIN
John F. Kreppein

APPENDIX D

Statutes and Rule Involved

TITLE 21, SECTION 173, UNITED STATES CODE

173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* —It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any

narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, §2, 35 Stat. 615; Jan. 17, 1941, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, §3, 46 Stat. 586.)

TITLE 21, SECTION 174
UNITED STATES CODE

§174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

[For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, Title I, §105, 70 Stat. 570.)]

Title 26, Section 7607
United States Code

Additional authority for Bureau of Narcotics and Bureau of Customs

The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 (1) of the Tariff Act of 1930, as amended; 19 U.S.C. sec. 1401 (1)), may—

(1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpenas and summonses issued under the authority of the United States, and

(2) make arrest without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is commiting such violation.

(Added July 18, 1956, ch. 629, title I, §104(a), 70 Stat. 570)

Appendix D—Statutes and Rule Involved

RULE 41
FED. RULES CRIM. PROC.
SEARCH AND SEIZURE

* * * *

(e) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds upon which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * *

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780-513--65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 121

ALBERT BRACER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R. II,[1] 65a) is reported at 342 F. 2d 522.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1965 (Pet. App. B; R. II, 70a). On April 8, 1965, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including May 8, 1965, and the petition was filed on

[1] "R. II" refers to Vol. II of the record in this Court which consists of the Appendix for the Appellee in the court below with additions. "Tr." references herein are to the trial transcript.

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, who made affirmative use of his own written confessions in his defense prior to the time such confessions were offered in evidence by the government, and whose sole objection thereafter (made at the close of the government's case) was to the voluntary nature of one of the confessions, may now urge for the first time that the confessions were obtained during an unreasonable delay in arraignment, in derogation of his right to counsel, and at a time when he was mentally incapacitated.

2. Whether the evidence was sufficient to show (1) that there was probable cause to arrest petitioner without a warrant, and (2) that the subsequent search of his apartment was made pursuant to his voluntary consent.

STATEMENT

An indictment returned in the United States District Court for the Southern District of New York charged petitioner, one Richard Solero, and another with violations of narcotics laws, 21 U.S.C. 173–174 (R. II, 1a–7a). A motion by petitioner to suppress evidence was denied after a pretrial hearing, and again at trial, and petitioner was found guilty by a jury on two substantive counts and one conspiracy count. He was sentenced to imprisonment for seven years on each count, the terms to run concurrently. On appeal, during which petitioner questioned the legality of his arrest and the search of his

apartment, as well as the sufficiency of the evidence to support the conspiracy charge, the conviction was affirmed.

1. In late 1962 and early 1963, federal narcotic agents were conducting an undercover operation (Tr. 19, *et seq.*). Agent Bailey had information from files of the Bureau of Narcotics regarding petitioner's record of narcotics violations and information from fellow agents to the effect that petitioner was a narcotics peddler (R. II, 57a). On April 1, 1963, co-defendant Solero, from whom Agent Bailey had purchased heroin, left the agent for the avowed purpose of obtaining an additional ounce (R. II, 43a–44a). Solero, who was followed by other agents, went directly to petitioner's apartment and then returned immediately to Bailey to give him the quantity of heroin (R. II, 60a–61a). On April 3, 1963, Solero told Bailey that he was going to meet his "connection" in a few moments (R. II, 44a–45a). Agents saw Solero proceed to an intersection where petitioner, driving by, repeatedly circled and motioned to Solero, but did not stop (R. II, 61a–62a, 59a). Returning to Bailey, Solero told him that he had just seen his connection but that, for some reason, the connection did not stop (R. II, 22a).

On April 8, 1963, when Solero was arrested, he told Agent Bailey that he had been obtaining his heroin from petitioner (R. II, 45a–47a). On April 10, 1963, at about 10 p.m., as petitioner was driving with his young nephew, he was stopped by Agent Bailey and three other officers (R. II, 42a–43a, 47a, 54a). Bailey, acting without a warrant, identified him-

self, placed petitioner under arrest, and searched him. Petitioner immediately admitted that as he saw the officers approaching he "got rid of" the narcotics he had with him. On the floor of the automobile, Bailey found a white powder subsequently identified as heroin (R. II, 49a, 53a).

At this point, petitioner denied that he had more heroin at his house. He then asked the officers if they would move across the boulevard to a more secluded spot since he did not want people whom he knew to see him there with the officers. The officers complied. They informed petitioner that they had a great deal of evidence against him. He said he was only an addict (see Tr. 289–292, 305–307). Agent Bailey then told petitioner that Bailey knew that narcotics were kept in petitioner's kitchen cabinet, and petitioner admitted that he had a small amount—approximately one ounce—there. When the officers said they would get a search warrant, petitioner, expressing concern that his pregnant wife and aged mother might become upset, advised the officers that they would not need a warrant. He agreed to go with them to his apartment and turn over the heroin, if not more than two officers would accompany him (R. II, 53a–55a; Tr. 307–308).

At approximately 12 o'clock, Bailey, one other agent and petitioner proceeded to the apartment (Tr. 292, 308, 512). Petitioner's wife answered their knock, and petitioner said, "it's all right." She shut the door momentarily, asking to be allowed to put on a robe (R. II, 51a). While the door was closed, Bailey told petitioner he would be "awful mad" if petitioner's

wife were "getting rid" of the narcotics, and petitioner assured Bailey that she knew nothing and would admit them (R. II, 52a). Once inside, petitioner led the way to a kitchen cabinet from which Bailey removed a brown paper bag containing 12 ounces of heroin (R. II, 56a).

2. At trial, the government's first witness was Agent Bailey, who testified regarding his dealings and conversations with the two co-defendants, the arrest of petitioner on the night of April 10, and the seizure of heroin in petitioner's automobile and apartment (Tr. 19–70). Bailey did not testify, on direct examination, to any statements taken from petitioner after the search of his apartment. He was subjected to extensive cross-examination by all defense counsel. Petitioner's counsel developed evidence that petitioner, in addition to oral admissions made at the time of arrest, had given two subsequent written statements in question-and-answer form. One of these statements had been given to Agent Bailey, in the presence of another officer, after the arrest and recovery of narcotics upon arrival at the Narcotics Bureau (at 3:30 or 4 a.m.). Petitioner was then showing preliminary symptoms of withdrawal from narcotics (Tr. 312–313, 323–334). The second statement had been given to Assistant United States Attorney Gold, in the presence of Bailey and two other agents, later that morning (at 10:55 a.m.), when petitioner had been awakened and brought to the United States Attorney's Office from a detention cell (where he was placed after making his statement to Bailey) (Tr. 336–342). Petitioner was then taken be-

fore a United States Commissioner and released upon his own recognizance (Tr. 344).

On recross-examination of Agent Bailey (following a redirect examination that made no mention of petitioner's written statements), petitioner's counsel asked to examine the statements; government counsel then requested that they be marked for identification (Tr. 361). Petitioner's counsel asked Bailey if the statement he took from petitioner was not one "that would overcome your failure to obtain a search warrant."[2] The court sustained an objection to this question on the ground that petitioner was attempting to submit secondary evidence—that the best evidence was the statement itself (Tr. 361–362).

On further redirect examination, government counsel asked Agent Bailey to identify the statement he had taken from petitioner (Tr. 363). On further recross, petitioner's counsel asked Bailey to read certain portions of the statement given by petitioner to Assistant United States Attorney Gold. In a bench conference, counsel explained that he was attempting to impeach the testimony of the agent that the officers had given no drugs to petitioner during the night of arrest (Tr. 364–367; see Tr. 293). The court sug-

[2] This statement (See Petition Appendix C) indicates that Agent Bailey was apparently interested in recording the details of petitioner's arrest and the subsequent search of his apartment. It shows that petitioner (admitting the presence of heroin in his car and apartment), although denying that he gave the officers permission to "search" his house, admitted that he told the officers that there was a small amount of heroin there, that he offered to give it to them and voluntarily took them to the apartment where he did so.

gested that this was merely a protraction of matters previously covered and counsel released the witness without further inquiry (Tr. 367).

Agent Kreppein thereafter testified on direct examination as to his surveillance activities, the arrest of codefendant Solero on April 8, and the arrest of petitioner and seizure of heroin on April 10 (Tr. 371–397). He was asked to identify the statement given by petitioner to Agent Bailey (Tr. 401). Following an extensive cross-examination during which the events of the night of petitioner's arrest were again thoroughly covered, petitioner's counsel asked Kreppein whether Assistant United States Attorney Gold, on the morning after the arrest, had asked petitioner whether the police had given him drugs (Tr. 532). When the witness replied that he did not believe the question had been raised, counsel directed his attention to a copy of the statement given by petitioner to Gold (Tr. 533). In an apparent attempt to impeach the testimony of Kreppein that he in fact had not given drugs to petitioner (Tr. 534), petitioner's counsel was permitted to read a portion of that statement (in which petitioner had been asked about his use of drugs that night), despite the objection of government counsel that he was reading from a document not in evidence (Tr. 535). Upon the further assertion that counsel wished to refresh the recollection of the witness as to whether petitioner told him he received drugs only from codefendant Solero, counsel was permitted to read questions and answers from the statement relating to the receipt of drugs (Tr. 538–541).

At the conclusion of the government's case, the statement given to Mr. Gold, with deletions agreed upon by the parties, was offered by the government and admitted into evidence without objection from the defense except for the contention that a few other portions should be excised for lack of relevance (Tr. 595–596, 593–601).[3]

At the same point in the trial, the statement given to Agent Bailey was offered and received into evidence over the objection that "[w]hile not obtained under duress, it was obtained under circumstances that may amount to physical duress" (Tr. 602). The court indicated that it would leave that question to the jury (Tr. 602–603). Petitioner's counsel then requested that the court charge the jury on voluntariness with respect to both statements (Tr. 604), and the court did so (Tr. 881). Both statements were read to the jury (Tr. 604, 605).

During his summation to the jury, petitioner's counsel, suggesting that the agents had used drugs

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[3] The statement (see R. II, 34a–40a) indicates that petitioner, after being advised of his right not to answer and his right to counsel, admitted that he had a $5 or $10 bag of heroin in his car when arrested; that he voluntarily took the officers to his apartment (though he denied that he knew he was not required to do so); and that he freely gave the agents the 12 ounces of heroin found there. It further shows that petitioner denied selling narcotics and explained that he was a user who received narcotics from Solero. Petitioner said he had last used narcotics, which he had with him, that morning at 4 o'clock in the Narcotics Bureau; that he now felt "terrible" but understood what had been discussed; that his mind was not cloudy as a result of his need for narcotics; and that he had not been threatened, promised anything, or mistreated.

as a bribe to elicit petitioner's first written statement (relative to the search of his apartment), referred to remarks in the statement given to Gold regarding the use of drugs on the morning after arrest (Tr. 834–835). And in arguing that it was Solero who had wrongfully implicated petitioner, petitioner's counsel referred to what he termed "testimony" in the Gold statement that petitioner was a drug "user" who obtained his drugs from Solero (Tr. 841). Government counsel read from the same portion of this statement in arguing knowledge of possession on the part of petitioner (Tr. 856)—which he said was shown by the initial oral admission and the two subsequently recorded ones (Tr. 854–857). During its deliberation, the jury asked for and received copies of the written statements (Tr. 899, 900, 901).

ARGUMENT

1. In this Court, petitioner urges for the first time that written confessions were obtained from him during a period of unnecessary delay in arraignment, in violation of his constitutional right to counsel, and at a time when he was "mentally disabled" by withdrawal from narcotics. See *Mallory* v. *United States,* 354 U.S. 449; *Escobedo* v. *Illinois,* 378 U.S. 478; *Townsend* v. *Sain,* 372 U.S. 293. These allegations, if established after an evidentiary hearing, would require the exclusion of petitioner's confessions from evidence. In the present case, however, petitioner not only failed to object on these grounds, but actually sought to have portions of the challenged confessions presented to the jury. The fact that petitioner him-

self first brought up the matter of the confessions and sought to use them affirmatively in his defense surely precludes any present claim based upon their admission. The record shows, for example, that before the confession made by petitioner to Assistant United States Attorney Gold was offered for admission, petitioner used it (including direct quotations therefrom) for impeachment purposes, to suggest that the statement earlier given to Agent Bailey was not credible and to buttress his defense that he was only a user of drugs who was wrongly implicated by his codefendant. It was petitioner who developed at length on cross-examination and in the presence of the jury, all the circumstances relative to the making of both challenged statements without raising the issue of their admissibility on any ground and without requesting the court to make a preliminary determination as to voluntariness. See *Jackson* v. *Denno,* 378 U.S. 368. Having followed this strategic course, petitioner should not now be heard to urge reversal on the basis of the admission of the confessions. The government's case, both as to the voluntariness of the search and petitioner's possession of narcotics, was proved, during the prosecution's evidence, by the testimony of the agents. It was only after petitioner relied on the confessions during cross and recross-examination that the government first offered the complete documents into evidence.

2. There is no occasion for this Court to review findings of both courts below that there was probable cause to arrest petitioner without a warrant and that

the search of his apartment was made pursuant to voluntary consent. The facts known to Agent Bailey at the time of arrest (see pp. 3–4, *supra*), were more than adequate to sustain an arrest without a warrant. Narcotics agents have specific statutory authority to arrest in such circumstances. 26 U.S.C. 7607. The claim that petitioner did not know that he had a right to withhold consent to the search of his apartment is unpersuasive. Petitioner was not inexperienced in matters of law; he bargained with the officers when they suggested that they were prepared to secure a search warrant, and chose to let them search under specified conditions.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

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IN THE

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OCTOBER TERM, 1965

No. 121

ALBERT BRACER,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

ARGUMENT

The Government argues that we cannot now complain of the use of the two written statements against petitioner Bracer at the trial because, the Government says, Bracer's trial counsel (Mr. Segal) himself first brought these statements to the Jury's attention.

Before we recite the chronological trial facts as to just who it was that really first brought up the two written Bracer statements and as to how they were used, the general "lay-out" of the case from the prosecution's and from each defendant's standpoint in this trial should be noted. The co-defendants Torres and Solero in effect admitted the charges of narcotic dealings with Agent Bailey; Torres claimed entrapment (Tr. 802-807; 21a); Solero (*per* his

counsel's summation to the Jury) asked only that his conviction be limited to a single count of the Jury's own selection under the multiple-count indictment (Tr. 812-813). Solero also took the stand and swore to the Jury that he had framed Bracer; that is, Solero testified that very shortly after he had deposited in Bracer's home around April 1, 1963 the substantial quantity of heroin involved in Count Seven* he became fearful that Bailey was an Agent and he decided to purchase favor for himself with Bailey by falsely "turning over" Bracer to Bailey as his (Solero's) source of supply, when in truth Bracer was nothing but an addict whom Solero had used to store this heroin, playing upon Bracer's hopes for a free "shot" (Tr. 714-716, 720-722, 725-750; and see Solero's cross-examination by the Government at Tr. 751-779 where his exculpative testimony concerning Bracer remained unshaken). Solero said his framing of Bracer began on April 3, 1963 when Solero set up a street meeting where the agents would be able to observe Solero and Bracer rendezvous-ing in a furtive manner supposedly for the purpose of Bracer's supplying heroin to Solero, when in truth Solero got Bracer to show up on that occasion through a promise of giving him a free "shot" (Tr. 726-731). It was undisputed that on April 23, 1963 Solero recanted in writing to the Agents a statement of April 8 accusing Bracer of being his source of supply, stating instead on April 23 that he (Solero) had merely used Bracer as a depository (Tr. 190-216, 739-50; Deft's Ex. A, read to Jury at Tr. 608). This second Solero state-

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* It will be recalled that Bracer was convicted under Count Six (involving the small "users" quantity swept from the floor of Bracer's automobile), Count Seven (involving the much larger quantity found in Bracer's apartment), and Count Eight (conspiracy) (Pet. Cert. pp. 4-5).

ment apparently was not made known to the Grand Jury which indicted Bracer (Tr. 215-217). In an unusual stand of professional statesmanship, Solero's trial counsel, Miss Perlmutter, told the Jury in her opening that Solero's principal objective in this trial was to undo the wrong that he had done to Bracer in having depicted the latter to the Federal Narcotics Police as a heroin source of supply rather than as a mere addict whom Solero had falsely used in an effort to save himself (Tr. 10-14); Miss Perlmutter stressed this same theme in her summation to the Jury (Tr. 816-817). Even at the sentencing—when Solero surely had nothing to gain by persisting in his exculpation of Bracer—Solero volunteered that "everything I said was the truth, and I know it was the truth" (Tr. June 16, 1964, p. 57). For additional indications, throughout the trial testimony, that Bracer surely was not a "source of supply" of heroin see, e.g., Tr. 204, 205, 215-220, 260, 608, 677-681, 695-697.

Thus, the Bracer defense knew from the outset of the trial that Bracer's whole defense position—of being an admitted narcotics addict rather than a "dope pusher"—was going to be dramatically supported by a remorseful co-defendant. And as the trial proceeded this unusual situation was to become combined with another (and, unhappily, less unusual) theme, namely, the characteristic zeal of the Federal Narcotics Bureau agents in trying to "make a case" by inducing persons under narcotic investigation to put the Bureau "in contact" with "sources of supply" (e.g., Tr. 626-660, 725-750).

In short, from the outset of the trial and increasingly as the trial proceeded it was borne in upon the Bracer defense that the fate of this hapless young narcotics addict

must almost surely turn on the extent to which the defense might succeed in bringing home to the jurors' minds that Albert Bracer was the victim of Solero's initial cowardly selfishness and the investigative ardour of the Federal Narcotics police.

It is against this background of the peculiar trial "strategy" setting which Bracer's trial attorney evidently felt his client's defense must reflect, that evaluation should be made of the constitutional import of what the Government here claims amounted to some kind of election on the part of the Bracer trial defense to bring to the Jury's attention the Bracer written statements.

We turn now to the chronology of the trial happenings which relate to the bringing of the Bracer written statements to the attention of the Jury; in the recitals which follow it will be noted that we include references to the search and seizure aspects of the case along with our references to the Bracer written statements, our reason for doing so being that (as will appear) Bracer's trial counsel was evidently trying, albeit not with invariable "strategic" surehandedness, to get across to the Court and the Jury the sense of overall injustice and constitutional oppressiveness in the way the Government had gone about making its investigative and prosecutive case against Bracer.

Chronologically, the first item in this (again, admittedly, less than "strategically" perfect) pattern of the Bracer trial defense was Mr. Segal's objection (on grounds of unlawful seizure), during the direct examination of the Government's first witness Narcotics Agent Bailey, to the introduction in evidence of or any reference to the small "user's" quantity of heroin which was swept from the

floor of Bracer's car on the night of his arrest, April 10, 1963 (Tr. 67).*

Next—and further relating to the testimony of Agent Bailey who, the Government correctly states (Br. in Opp. p. 5), did not testify on direct examination to any statements taken from Bracer after the search of his apartment later on the night of April 10—the herein relevant trial chronology proceeds with an item in the cross examination of Bailey at Tr. 202, with which Bracer's own trial attorney had nothing to do; under the order of cross examination of the Government's witnesses Bracer's attorney, Mr. Segal, cross examined last, Mr. Molofsky (for Torres) and Miss Perlmutter (for Solero) being first and second, respectively. The item at Tr. 202 just mentioned was in the cross examination of Bailey by Miss Perlmutter in which she was asking the witness about his knowledge of the second or recantation statement by Solero wherein Solero had said that he had given Bracer "a fix", and Miss Perlmutter was asking Bailey whether at the time of Solero's recantation statement he had known that Bracer was an addict, to which Bailey answered "I know that he said he was". Miss Perlmutter's questioning continued as follows (Tr. 202):

> "Q. You spent a night with the defendant Bracer, did you not? A. That's right.
>
> Q. You viewed his actions that night, did you not? A. Yes.

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* It will be recalled that the Bracer defense had moved before trial to suppress the evidence seized at Bracer's home later that night (Pet. Cert. p. 12); the item at Tr. 67 mentioned in the text above, which related to the earlier seizure of heroin that same night in Bracer's car, had not been included in the pretrial motion; later in the trial such inclusion was made more explicit and formal by the Bracer defense (*infra*).

> Q. I ask you again, did you know that the defendant Bracer was a dope addict? A. I know that he said he was."

Here, then, was the first testimonial indication to the Jury in this trial that agent Bailey had spent a considerable time with Bracer subsequent to the last happenings to which Bailey had testified in his direct examination in regard to Bracer, i.e., subsequent to the visit and search at Bracer's apartment on the night of April 10, 1963. With this item having been brought to the Jury's attention, not by Bracer's own attorney, it is fair to say that even if Bracer's attorney might otherwise have thought it best for his client to leave alone the topic of Bailey's having "spent a night" with Bracer after the search of the Bracer apartment, there would now be at least a strong prudent impulse on the part of the Bracer defense to go further into this topic when the Bracer cross examination of agent Bailey came around in due order.

The next item is also one which came into this trial record during Miss Perlmutter's cross examination of agent Bailey. At Tr. 213 Miss Perlmutter was asking Bailey about his effort to locate a man named Reeves or Reed whom Solero had named in his recantation statement as his actual source of supply, and in an unresponsive reply to one of these questions by Miss Perlmutter Bailey gratuitously brought in a reference to "meetings with * * * Al Bracer in an attempt to get information and develop that information. These relate to other narcotic violators" (Tr. 213). Here again, then, the Jury's interest was being stimulated (and, likewise, again, not by Bracer's own trial attorney) concerning apparent dealings between agent Bailey and Bracer to which Bailey had not testified in

direct examination and which must unmistakably have occurred subsequent to the visit at and search of Bracer's apartment on the night of April 10, 1963, which was the latest Bailey-Bracer item to which Bailey had testified on direct examination.

It was only after these items that the items now to be noted, in the cross examination of agent Bailey by Bracer's own attorney (Mr. Segal) came into the trial record:

At Tr. 292-295 Mr. Segal touched, for the first time, upon the period subsequent to the search of Bracer's apartment (the night of April 10, 1963), the questioning here being strictly confined to the question of whether later that night Bracer was showing narcotics "withdrawal" symptoms and whether the agents gave him any narcotics.

At Tr. 304 there occurred the following (in Mr. Segal's cross examination of agent Bailey) which we respectfully deem to be of decisive importance as affecting the issue which the Government has raised as to the "elective" strategy of the Bracer defense in having supposedly chosen to open up for the Jury the entire topic of the Bracer written statements. Mr. Segal (at Tr. 304) was asking Bailey whether *when he was talking to Bracer in the latter's automobile at the time of his arrest during the first-stage happenings on the night of April 10,* "did he tell you about Solero". Bailey gratuitously replied, "He did, eventually. I don't know if he admitted right away everything." When Mr. Segal then remonstrated with Bailey that this answer was not responsive, there followed a fencing colloquy between Bailey on one side and the Court and Mr. Segal on the other side, in which at one point Bailey said "The day of his arrest I had several conversations with him" (Tr.

304). This fencing by Bailey, with repeated combination of both hinting and evasive answers (i.e., hinting at other conversations with Bracer) continued from Tr. 304 to Tr. 306.

Then, at Tr. 308-321—whether with perfect "strategic" wisdom or not being a question which we can hardly believe will prove decisive, in this Court, of the grave constitutional issues involved—Mr. Segal questioned agent Bailey about the night-long peregrinations of the agents and Bracer on April 10-11, 1963 and the concurrent grilling of Bracer. It is evident from a reading of this testimony at Tr. 308-321 that Mr. Segal was, at least primarily, trying to elicit from Bailey whether during that night Bracer had been endeavoring to exculpate himself as a mere user of narcotics rather than as having been Solero's source of supply. And, as Mr. Segal also kept hammering away at Bailey on the topic of whether Bracer was showing narcotics "withdrawal" symptoms that night, Bailey suddenly delivered himself of another of his gratuitous revelations, which had not been remotely elicited or sought by the Bracer defense (Tr. 312):

> "Q. Did you speak to him at 3:30 or 4 o'clock in the morning at 90 Church Street? A. Yes, sir, I believe I did.
>
> Q. Were you able to get him to speak rationally? A. Yes, sir. *He gave me a statement.*
>
> Q. Did he speak rationally? A. *He gave me a statement.*
>
> Q. I beg your pardon? A. I said, yes, sir, he gave me a statement." (Emphasis added)

Thus it was *via* agent Bailey's gratuitous remarks above quoted that the Jury in this trial learned, for the first time,

of Bracer's having given a statement to the narcotics agents at 90 Church Street late in the night of April 10-11, 1963. It is true that Mr. Segal's immediately next following question to Bailey elicited the further fact that the statement was in typewritten question and answer form (Tr. 312-313), but it is manifest from a reading of this next portion of the Bailey testimony that, again, Mr. Segal was aiming at the fact of Bracer's having been physically and mentally incapacitated during the taking of this statement, and that he was in nowise "electing" (at that juncture) to bring out *anything about the contents* of that statement (Tr. 312-313)—indeed, as will appear, the only aspects in which Mr. Segal ever in this trial let himself go into the contents of either of the Bracer written statements (i.e., the one taken by the agents or the subsequent one taken by Assistant United States Attorney Gold) were in regard to the question of Bracer's mental and physical condition at the time, and in regard to whether Bracer had tried to exculpate himself on the point of who owned the heroin in his apartment (i.e., whether it was his or Solero's);* and

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* It is of interest also that there are facts persuasively pointing to Mr. Segal's himself having been, quite believably, under a factual uncertainty (at the time of his above described questioning of agent Bailey) as to whether Bracer had given the agents the typewritten statement which Bailey had gratuitously thrust before the Jury's attention. In the pretrial motion to suppress Bailey had said such a statement had been taken, although he had so testified in a somewhat unsure way (Tr. Mot. Supp., p. 22); but agent Kreppein, who is noted in writing as having been present with Bailey at the taking of the Bracer statement here referred to (Pet. Cert., Appendix C, p. A8), had testified in the motion to suppress proceeding that no such written statement had been taken from Bracer by the agents or signed by him, and even when pressed by the District Attorney and the Court Kreppein had no recollection of it (Tr. Mot. Supp. pp. 39-42). We mention these facts for their further indication

as to this last it is evident that what Mr. Segal was driving at was only that the large quantity of heroin found in Bracer's apartment was not of that "user's" scale of quantity which Bracer would have been likely to have around as his own property (Tr. 317). Indeed, so assiduously bent was Mr. Segal upon "staying away" from any plenary "election" to spread before the Jury unrestrictedly the full text of the Bracer written statements that he was obliged (at Tr. 317) to remonstrate with Bailey when the latter wanted to refer further to the written statement given to the agents.

This entire last-described question-and-answer exchange between Mr. Segal and Bailey concerning the Bracer written statement to the agents on the night of April 10-11—an exchange in which, as we have emphasized, Mr. Segal was trying so carefully to avoid the very "election" which the Government is now suggesting—took still another decisively significant turn at Tr. 319-321, when the Court itself took over the questioning of Bailey:

> "*By the Court*:
>
> * * * * *
>
> "Q. Mr. Segal questioned you about whether or not Bracer on the night of his arrest told you about Solero. That was what he asked you and you said

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that, in all fair likelihood, Mr. Segal's above described questioning of agent Bailey at the trial was not a consciously "elective" choice to "elicit" the fact of Bracer's having given a written statement to the agents, and that in all fair likelihood to the contrary the case is, as above suggested, that the first revelation to the Jury in this trial that any such written statement existed was the result of the over-eager testimonial "initiative" of agent Bailey.

he eventually did. Tell us what he eventually on that night told you about Solero? A. In the office of the Bureau of Narcotics during the taking of the statement of Bracer I believe, if I recall correctly, he described his relationship with Solero. I would have to see the statement.

Q. Is it true that whatever you were referring to as to what Bracer told you about Solero that night would be contained in the typewritten statement that you prepared? A. Yes, sir. He told me several stories about Solero. He changed his story when we started to take the statement after he agreed to cooperate. He at first had told me that he was addicted and he was holding the stuff for other people, and then when I described to him that I knew more than he thought I knew he admitted to the situation as it was and I—

The Court: Strike out 'he admitted to the situation as it was.'

Q. He told you certain additional statements? A. Yes.

Q. Is that contained in the typewritten statement? A. Yes, sir.

Q. That was also, of course, after his arrest? A. Yes, sir.

Q. That was when he was down in the Bureau of Narcotics' office around 3:30 or 4:30 in the morning? A. Yes, sir."

With the above questioning of Bailey by the Court, the "cat was out of the bag" with a vengeance as regards the Jury's awareness of Bracer's having made written statements. The "election", then, was that of the Government's principal witness (Bailey) and of the Trial Judge, not of Bracer or his trial attorney.

The above questioning of Bailey by the Trial Court came at the close of the trial session on May 12, 1964. In Mr. Segal's resumption of the cross examination of Bailey (Tr. 322, et seq.), Mr. Segal devoted considerable further time to the topic of the agents' and Mr. Gold's interrogation of Bracer during the early morning of April 11, 1963 (Tr. 322-346), but this further questioning of Bailey by Mr. Segal dealt exclusively with the subject of Bracer's mental and physical condition as occasioned by his narcotic "withdrawal" symptoms, plus the subject of the Government's overtures to Bracer to "cooperate"—which last will scarcely be taken as connoting a plenary "election" by the Bracer defense to open up without limit for the Jury's attention the contents of the written statements, in view of the obvious and legitimate interrelationship of the question of Bracer's physical and mental helplessness on one hand and his susceptibility to Government pressures for "cooperation" on the other hand.

The next item in the herein relevant trial chronology is at Tr. 360, et seq., where, in Mr. Segal's re-cross examination of agent Bailey he requested the Government to turn over to him the two Bracer written statements (Tr. 360-361); Mr. Segal then asked Bailey whether it was not a fact that the statement taken by the agents was one "that would overcome your failure to obtain a search warrant to go to his house", to which the Government objected that "the best evidence is the statement itself", and the Court sustained the objection (Tr. 361-362);* then, at Tr. 363-364

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* Note how the Government was here, step by step, laying the ground for the *coup* of ultimate reception in evidence of the two written Bracer statements.

the prosecutor had agent Bailey identify the first of the two Bracer written statements;* then, at Tr. 364, upon further re-cross examination of Bailey by Mr. Segal, Mr. Segal endeavored to show from the last page of the Bracer written statement taken by the agents that Bracer had been given a shot of heroin by the agents at 90 Church Street, Mr. Segal having made this endeavor by asking Bailey to read the relevant portion of the statement only to himself, but at Tr. 365 on the prosecutor's objection the Court blocked this effort, and in a colloquy at the Bench Mr. Segal then tried to convince the Court on this point but the Court adhered to its ruling on the grounds that the subject had been sufficiently covered, that it was becoming too protracted, and that Bracer had had enough opportunity previously to get the statement in (Tr. 365-367).**

The next item is that in the Government's direct examination of agent Kreppein it further advanced its own step by step "elective" strategy of getting the two Bracer written statements before the Jury, by having agent Kreppein identify the statement given by Bracer to the agents (Tr. 401).

In Mr. Segal's cross examination of Kreppein he questioned the witness about Bracer's "withdrawal" symptoms during the happenings of the night of April 10-11 after the agents and Bracer left the latter's apartment (Tr. 513-519); he also questioned Kreppein whether during that time Bracer had exculpated himself as to who owned the

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* We respectfully repeat our last preceding footnote.

** Note how here, once again, the Bracer defense was exerting every caution to avoid any inadvertent "election" to make plenary disclosure of the Bracer written statements before the Jury.

heroin seized in Bracer's apartment and Kreppein denied that Bracer had done so (Tr. 521-523).*

Again, at Tr. 523-531 Mr. Segal questioned agent Kreppein about Bracer's illness at 90 Church Street and details of the circumstances of his physical custody there.

At Tr. 531-536 Mr. Segal questioned agent Kreppein about the written statement which Mr. Gold had taken from Bracer, this questioning being directed exclusively to whether Bracer had had a dose of narcotics while in the custody of the agents that night and to his illness during that time; at Tr. 535 the prosecutor objected that Mr. Segal in this questioning of Kreppein was reading from an item not in evidence;** the Court allowed the questions for the purpose of eliciting whether agent Kreppein remembered that Bracer had been asked by Mr. Gold about his illness and about having been given a dose of narcotics.

At Tr. 537-541, where Mr. Segal was questioning Kreppein whether in the statement to Mr. Gold Bracer had claimed that he got narcotics from Solero for his own addictive use, the prosecutor objected again that the Gold statement was not in evidence (Tr. 538-539), whereupon the Court directed Mr. Segal to read from the Gold state-

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* We note that Kreppein's denial that Bracer had thus exculpated himself scarcely could add justification for any subsequent attempt by the Government to introduce in evidence the Bracer written statements—that is, since Kreppein denied that Bracer's written statements were exculpatory, how, conceivably, could the introduction of those statements be justified on any theory of "rebuttal"? Quite the contrary, the Government could (and did—see our description *infra* of the prosecutor's summation to the Jury) want those statements in evidence only because it deemed them inculpatory as to Bracer.

** This being one more gambit in the Government's now unmistakable "election" to get the Bracer written statements into evidence in this trial.

ment (which did support Mr. Segal's theme), and thereupon agent Kreppein denied that Bracer had made any similar claim in the prior statement that night which he had given to the agents (Tr. 539-541).*

In the item which we are now to mention—and which is chronologically the next relevant item in these recitals**—the Bracer trial defense "strategy" may have stumbled, but we do not think that this is significant in point of the issues of constitutional procedure here involved. At Tr. 590-601 the prosecutor announced a stipulation that the stenographer who had taken the Bracer statement to Mr. Gold would testify that she had transcribed it, and Mr. Segal, subject only to certain objections as to disputed items of deletion, did not object to the admission in evidence of this statement. At Tr. 602-603, relating to the admission in evidence of the Bracer statements to the agents, Mr. Segal began to recover himself and declared that "there may be objection on the theory that while not obtained under duress it was obtained under circumstances that may amount to physical duress." At Tr. 603-604 the Court told the Jury that it would later instruct them on the issue of voluntariness. At Tr. 604 Mr. Segal further recovered himself and

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* We here again note that, in view of this flat denial by agent Kreppein, there could scarcely be a justification, on any "rebuttal" ground, for the Government's subsequently introducing in evidence the text of Bracer's written statement to the agents. And in this connection it is revealing that, in the prosecutor's re-direct examination of agent Kreppein there was no reference to the Bracer statements such as might have been expected if the Government were following a bona fide trial strategy of "rebuttal", rather than a strategy of ambush to destroy the Bracer defense by introducing the Bracer written statements on Bracer's own "election."

** Throughout these recitals on the subject of the alleged election of the Bracer defense to spread the two Bracer written statements before the Jury, we are aiming at exhaustive factual presentation.

reuested the Court to submit to the Jury the question of voluntariness as to both statements (the one to the agents and the one to Mr. Gold).*

At Tr. 604 the prosecutor read to the Jury Bracer's written statement given to the agents, and at Tr. 605 he read the written statement given to Mr. Gold.

Tardily, but we trust not fatally so, Mr. Segal, after the Government had rested and in the course of his motions at that stage, objected to the reception in evidence of both the Bracer written statements on the ground of the "wholesale invasion of the defendant's rights under the circumstances" (Tr. 619-621, see Tr. 621).

As instancing the Government's strongly hopeful reliance upon the Bracer written statements to obtain a conviction against him in this notably weak case, the prosecutor at Tr. 623-624, in his argument that he had proved a prima facie case of conspiracy, cited to the Court Bracer's "statement * * * made at the time of his arrest"; it is manifest from the context of the Prosecutor's remarks at this place in the record that he was trying to reap advantage comprehensively from the entire pattern of Bracer's post-arrest statements, and not merely from the oral statements of Bracer in the automobile at the outset of the happenings of the night of the arrest.

At the conclusion of all of the proofs Mr. Segal, evidently having become progressively more mindful of the cumulation of unconstitutional impingements on his client, requested the Court to consider his constitutional contentions

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* Unfortunately, the Bracer defense did not, at this stage or later, invoke the more underlying principle of *Jackson* v. *Denno,* 378 U.S. 368 (see Pet. Cert. p. 16).

as including the search and seizure in Bracer's automobile at the outset of the arrest happenings (Tr. 786-796);* the Court entertained this request but denied it (Tr. 796).

In Mr. Segal's summation to the Jury he did, as the Government states in its Brief in Opposition, dwell upon the circumstances of Bracer's dealings and conversations with the agents on the night of his arrest following the visit and search at his apartment (Tr. 833-836, 840-841); and he did also plead to the Jury the issue of the voluntariness of Bracer's written statements (Tr. 833-836).** We nevertheless submit that, in the light of the above recited trial chronology and of the evidently dilemma-ridden anguish of the Bracer defense in its earnest efforts to keep working out a proper trial strategy under the extraordinary circumstances of this case with its initial frameup by Solero followed by the latter's recantations both before and at the trial, these oratorical exhortations by Mr. Segal in his summation to the Jury should not be given undue weight in this Court's evaluation of the constitutional issues presented.

Much more to the point is the issue of prejudice, both constitutional and atmospheric, presented by the prosecutor's remarks in his own summation to the Jury, in which

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* It will be recalled that at Tr. 67 Mr. Segal had first intimated a like contention and that this search-and-seizure phase had not been raised in the pretrial motion to suppress, which dealt only with the subsequent search at Bracer's home. We earnestly ask this Court to view with what we feel is a deserved constitutional sympathy and latitude this evolving awareness on the part of Bracer's trial counsel that his client was involved in an overall complex of really extraordinarily abusive unconstitutional procedures.

** I.e., instead of having invoked the rule of *United States* v. *Carignan*, 342 U.S. 36, *Smith* v. *United States*, 348 U.S. 147, 151; and *Jackson* v. *Denno*, 378 U.S. 368.

he made unstinting use of the Bracer written statements (as well as of Bracer's alleged oral admissions at the time of his arrest in the automobile), to tighten the noose around the neck of Bracer (Tr. 854-857). If it was procedurally unseemly (to put it mildly) for the Government to have spun the procedural web in the way it did in this trial with a view to insinuating the full text of the Bracer written statements into evidence notwithstanding the defense efforts to avert such, it was a deed of grave prosecutive unfairness in this Federal criminal prosecution to thrust home to the hilt in the Government's summation to the Jury the allegedly inculpative subject matter of those Bracer statements.

The only "chance" that Bracer was given by the Court, in its instructions to the Jury, to avoid the destructive effects of the written statements, was *via* instructions on the issue of voluntariness (27a-28a, 31a, 32a-33a). But this issue, as we have earlier urged (Pet. Cert. p. 16), should have been resolved in the first instance by the Court itself under the rule most recently elaborated in *Jackson* v. *Denno, supra.*

This is not a case where the raising of objections of constitutional-procedural aggrievement is mere "loophole-searching" by the defendant. Bracer had an excellent chance of acquittal, in view of the impressive stand taken on his behalf by the co-defendant Solero and his admirable counsel, Miss Perlmutter. The Jury did not have an easy time in deciding this case; they repeatedly returned for additional instructions, and while several of these requests by the Jury related to the problem of "entrapment"—which might be thought to refer primarily to the co-defend-

ant Torres—it is by no means clear in view of the entire tenor of the trial testimony that the Jury were worried only about "entrapment" in regard to Torres as distinct from Bracer (33a-35a, 36a, Tr. 903). The Jury also made specific requests for additional instructions concerning Bracer's part in the case (38a, Tr. 899-903). And, we especially emphasize, they wanted to know near the end of their deliberations whether they could recommend leniency as to any defendant (Tr. 899-903); there can be little doubt that, in the light of the entire trial testimony, this declared compassion by the Jury related to Bracer—the Court of course told the Jury that they were "in no way concerned with the question of punishment" (Tr. 901).

We respectfully submit that the Government in its opposition to this petition for certiorari departs from a humane constitutional perspective when it strives to defeat further review of the case of Albert Bracer on the ground that his trial counsel somehow elected to let the Jury consider written statements of the defendant which the Government does not trouble to deny were or very well may have been obtained from him by means of an extremely dubious constitutional character. In *Henry* v. *Mississippi*, — U.S. —, 13 L. Ed. 408, 415, this Court recently noted that, "where the circumstances are exceptional", trial "strategy adopted by counsel without prior consultation with an accused will not * * * preclude the accused from asserting constitutional claims * * *." While Bracer's present counsel, in this certiorari application, is not in a position to aver one way or the other whether the drug-besotted Albert Bracer and his trial counsel had any sort of meaningful *entente* on trial strategy in this case, it may

be stated that, from a reading of this entire record, the strongly likely conclusion is that, far from there having been any such consultative *entente* between client and trial counsel, the latter himself, despite all commendable earnest efforts on his part, fell short by far of that "strategic" wiliness which the Government here seeks to make the ground of the denial of certiorari to his wretched client.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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